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In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER STATE OF WISCONSIN

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STATE OF OKLAHOMA, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

UNITED STATES DEPARTMENT
OF COMMERCE, et al., *Petitioners,*

v.

CITY OF NEW YORK, et al., *Respondents.*

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. RESPONDENTS HAVE FAILED TO PRESENT ANY PRINCIPLED BASIS FOR RECOGNIZING CLAIMS THAT SPECIFIC CENSUS INNOVATIONS ARE CONSTITUTIONALLY MANDATED 2

II. THE SECRETARY'S DECISION WAS CONSTITUTIONAL 8

CONCLUSION 20

CASES CITED

City of Detroit v. Franklin,
4 F.3d 1367 (6th Cir. 1993),
cert. denied, 114 S. Ct. 1217
(1994) 7

Cuomo v. Baldridge,
674 F. Supp. 1089 (S.D.N.Y. 1987) 4

Franklin v. Massachusetts,
112 S. Ct. 2767 (1992) 1, 4, 9, 13

Karcher v. Daggett,
462 U.S. 725 (1983) 1, 7-9, 12

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 8

Orr v. Baldridge,
No. IP 81-604-C
(S.D. Ind. July 1, 1985) 2

Tucker v. U.S. Dept. of Commerce,
958 F.2d 1411 (7th Cir.),
cert. denied, 113 S. Ct. 407
(1992) 7

U.S. Dept. of Commerce v. Montana,
503 U.S. 442 (1992) 8, 17, 18

STATUTES CITED

2 U.S.C. § 2a 10

2 U.S.C. § 2a(a) 17

2 U.S.C. § 2a(b) 17

13 U.S.C. § 141(a) 10

13 U.S.C. § 141(b) 10

13 U.S.C. § 141(f) 10

13 U.S.C. § 195 2

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 2 ..... 1, 8-10, 12-14

U.S. Const. Art. I, § 2, cl. 3 ..... 3-4, 16-17

U.S. Const. Amend. XIV, § 2 17

OTHER AUTHORITIES

58 Fed. Reg. 69 (Jan. 4, 1993) 19

H. Hogan, *The 1990 Post-Enumeration Survey: Operations and Results*, American Statistical Association, 1991 Proceedings of the Social Statistics Section 6

U.S. Department of Commerce, Bureau of the Census, *Report of the Committee on Adjustment of Postcensal Estimates: Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates* (Aug. 7, 1992) 7, 19

United States Department of Commerce News, CB91-07 (Jan. 7, 1991) 17

SUMMARY OF ARGUMENT

Respondents leave unanswered the difference between review of census procedures claimed to be constitutionally proscribed and the affirmative recognition of constitutionally mandated census innovations claimed necessary to achieving the most accurate census practicable. Respondents' brief is notably silent regarding Congress' express constitutional authority to determine how best to take the census. The respondent states also fail to discuss their ability to "correct" the inequalities alleged to exist in their own congressional and legislative districts through the use of the adjusted block-level census data ordered released by the district court more than two and a half years ago.

Respondents expand the court of appeals' error by attempting to engraft a redistricting standard of "good faith" onto census decisions, without discussion or analysis of this standard in Art. I, § 2 cases. This allows respondents to transform a standard of review of census decisions for consistency with constitutional language and the constitutional goal of equal representation, *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2777 (1992), into an open-ended inquiry into subjective purpose. Much of respondents' factual argument is answered by the district court's findings that the Secretary's decision was neither arbitrary nor capricious. Equally important is respondents' misapplication of Art. I, § 2 precedent. A redistricting plaintiff bears the threshold burden of demonstrating the ability to achieve smaller population deviations than those resulting from the challenged plan. *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). Neither the district court nor the court of appeals found, and respondents could not demonstrate, that the statistical estimates enabled the Secretary to improve, and not simply change, the apportionment of Congress.

ARGUMENT

I. RESPONDENTS HAVE FAILED TO PRESENT ANY PRINCIPLED BASIS FOR RECOGNIZING CLAIMS THAT SPECIFIC CENSUS INNOVATIONS ARE CONSTITUTIONALLY MANDATED.

Wisconsin argued in its opening brief that where the procedures selected for taking the census are not claimed to be constitutionally proscribed, and at least where they do not represent a retreat from prior efforts to achieve census accuracy, the failure to adopt additional census innovations--in particular, previously untried procedures, having the potential for introducing significant errors into the counts and implicating serious issues of policy and legality--should be held not to violate the Constitution. Specifically, the decision whether to employ statistical estimation procedures to "correct" the results of the enumeration census is not mandated by the Constitution, but represents a legislative judgment to be made by Congress or, to the extent Congress has delegated its authority over census decisions, the Executive Branch.[1]

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[1]Whatever the similarities between methods of imputing residents of known housing units and statistical estimation of the entire population and its distribution, *see* Respondent's Brief at 4-5, a method of multiplying statistically derived fractional adjustment factors times every person actually counted in the census has never been used to apportion Congress. It may be noted that the district court case cited by respondents regarding imputation, *Orr v. Baldridge*, No. IP 81-604-C, Order and Memorandum Entry (S.D. Ind. filed July 1, 1985), found that "hot deck" imputation was not sampling, and therefore not barred by 13 U.S.C. § 195, prohibiting the use of sampling as part of the apportionment census.

In this brief, references to the Brief of Petitioner State of Wisconsin are given as "Wisc. Br.;" references to the Brief for the Federal Petitioners are given as "U.S. Br.;" references to the Brief of Respondents are given as "Resp. Br.;" references to the *Amicus Curiae* Brief of the Lawyers' Committee for Civil Rights Under Law, the

It is not that efforts should not be made to reduce or eliminate the unintended errors that are inherent in census-taking. Rather, constitutional text and history, this Court's precedent, logic and common sense reveal that a judicially enforceable right to procedures claimed necessary to achieving the "most accurate census practicable" (J.A. 48) lacks meaningful constitutional content, conflicts with Congress' express constitutional authority to direct the manner of taking the census and results in an untenable system of census governance. The recognition of claims to mandated census innovations has spawned two decades of protracted litigation, which, for having failed to improve equality, has succeeded in transforming a process intended to confer finality in the decennial reallocation of rights of political representation into one of recurring and prolonged uncertainty, and potentially, of upheaval. Respondents' brief cannot be regarded as offering any principled discussion of these issues.

1. Respondents leave wholly unanswered how the recognition of a judicially enforceable entitlement to specific census innovations can be reconciled with Congress' express constitutional authority to direct the manner of taking the census.[2] U.S. Const., art. I, § 2,

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American Civil Liberties Union, the American Jewish Committee, the NAACP Legal Defense and Educational Fund, Inc., the New York Civil Liberties Union and the Puerto Rican Legal Defense and Education Fund, Inc. in Support of Respondents are given as "Lawyers' Comm. Br.;" references to the Joint Appendix are given as "J.A.;" references to "Pet App." are to the Appendix to Petition for Writ of Certiorari in No. 94-1614.

[2] *Amici* supporting respondents suggest an institutional basis for rejecting the Constitution's allocation of census decisions to Congress, arguing that the "majoritarian branches" are inherently indifferent to an accurate count of minority populations. Lawyers' Comm. Br. at 6. The reality is that the "majoritarian branches" represent states, both in the election of Congress and the election of the President. The seven states that were plaintiffs in this action elect 158, or more than 36%, of the 435 voting Representatives to the House of Representatives and,

cl. 3. Nor do they dispute the inherently legislative nature of decisions regarding the best way of conducting the census.

2. Respondents leave largely unanswered the difference in review, under a standard of consistency with constitutional language and the constitutional goal of equal representation, *Franklin v. Massachusetts*, 112 S. Ct. at 2777, between decisions to adopt census procedures claimed to be constitutionally proscribed and decisions *not* to include specific methodological innovations claimed capable of improving census accuracy. Respondents suggest that under the court of appeals' decision, only census procedures for which "a systematic demonstration of a technique to improve overall accuracy" can be made will be constitutionally mandated. Resp. Br. at 67 n.30. Respondents go on to suggest that "only the [Census] Bureau itself is ever likely to be in a position to make such a demonstration," *id.*--a suggestion that is singularly unconvincing coming from those of the respondents to have pursued seven years of additional litigation to compel statistical estimation of the 1980 census after the Census Bureau concluded that adjustment was not feasible. *See Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987). The better analysis of the limits of claims to the adoption of additional census innovations is to assume that a census plaintiff *would* be capable of demonstrating a specific procedure's ability to improve the "overall accuracy" of the count. In many cases, all that would seem required would be an expansion of procedures already employed by the

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with respondent District of Columbia, 175, or nearly a third, of the 538 Electors to the Electoral College. Because states have an interest in having their minority populations counted in the census, there is no reason to assume the majoritarian process incapable of, or indifferent to, identifying and correcting census errors. Indeed, this case demonstrates the interest of some states to have residents counted in the census, whether or not they exist. The concerted efforts undertaken during the 1990 census to count minorities further belie this supposed institutional indifference.

Census Bureau. If a plaintiff *could* demonstrate that establishing toll-free telephone numbers to answer census questions in 30 non-English languages would produce more accurate totals than establishing lines in eight languages (*cf.* Pet. App. 15), or that an October 1 census would be more accurate than one taken April 1, in the constitutionally relevant sense of providing the population totals and distributions used to allocate representational rights over the next ten years (which it almost certainly would), or that expanding the Bureau's census awareness campaigns or targeted outreach programs or hiring additional enumerators fluent in Korean or Arabic would improve the overall count, then under a theory of constitutionally mandated census innovations, it would violate the Constitution not to do any of these.[3]

There are two related points, neither of which respondents answer. First, many census procedures seem to be wholly consistent with constitutional language and the goal of equal representation, even though additional procedures may be known to be capable of producing better counts. An April 1 census date seems entirely constitutional, as would a decision in 1960 to continue door-to-door rather than mailed enumeration. *See* Resp. Br. at 3-4. Second, the recognition of entitlements to procedures claimed necessary to taking the most accurate census practicable does not invoke an administrable

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[3]Respondents' suggestion of multi-district litigation or similar procedures to resolve multiple claims to specific census innovations, Resp. Br. at 60, underscores the inherently legislative character of deciding the best methods for taking the census and the lack of administrable standards of constitutionality for a court attempting to make that decision. A court adjudicating multiple claims to methods for improving the census would be called on to decide, not simply which innovations have the potential for improving census accuracy, but the best mix and level of innovations--the optimal number of canvassers to be hired who are fluent in non-English languages, the appropriate simplification of census forms, the correct size and stratification of any post-census samples used to derive statistically estimated corrections, the scope of targeted outreach.

standard of constitutionality. Whatever procedures are adopted, additional procedures could always be added that would make the census still more accurate.

3. The absence of meaningful standards of constitutionality is still more problematic where the innovation advanced promises uncertain improvements in census accuracy and holds the potential for introducing its own distortions in the counts. Unless racial and ethnic coverage rates are known to be uniformly distributed across all states--non-Hispanic whites living in Massachusetts having the same chance of being counted in the census as non-Hispanic whites living in Texas--confirming the existence of the differential undercount is not enough to know whether its errors will result in actual representational inequality, either at the state or national level. It is certainly insufficient to allow a court to determine that a specific post-census sampling procedure will be capable of correcting these errors without introducing new errors. The texture of the PES estimates was much more complex than is captured in the term, "differential undercount." If the PES is to be believed, Massachusetts' undercount was roughly one-seventh the size of Montana's, Idaho's or Wyoming's; Pennsylvania's, less than one-fourth; New Jersey's, Illinois's and Michigan's, one-half (Administrative Record ("A.R.") App. 10 (June 13, 1991, Release), Table 1). Every state in the Northeast and Midwest had undercounts below the national average (*id.*). Blacks living in Milwaukee had lower undercounts than non-Hispanic whites living in Los Angeles. H. Hogan, *The 1990 Post-Enumeration Survey: Operations and Results*, American Statistical Association, 1991 Proceedings of the Social Statistics Section, 1, 10. Milwaukee, home to roughly three-fifths of Wisconsin's African-American residents, had an undercount half that of Madison (A.R. App. 10 (June 13, 1991, Release),

Table 2).[4] None of these results is implied by the existence of a differential undercount.

4. Respondents elect not to comment on the upheaval in state redistricting threatened by a system of census governance in which competing statistical definitions and measurements of census accuracy remain the province and focus of litigation years after the census has been completed and reported.

5. Respondents neither mention nor offer any principled basis for resolving the conflict between the Sixth and Seventh Circuits' decisions in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992), and the Second Circuit's decision. Respondents identify intrastate districting inequality as an unconstitutional consequence of adherence to the enumeration census, Resp. Br. at 27-28, but do not discuss their ability to use non-census data to redistrict if the numbers represent "'the best population data available.'" *City of Detroit*, 4 F.3d at 1373 (quoting *Karcher v. Daggett*, 462 U.S. at 738). Significantly, the respondent states fail to explain why they have tolerated the inequality that they allege exists in their own congressional and legislative

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[4]The ability of the PES to worsen equality of representation in intrastate districting is seen in the mis-estimation of the populations of Madison and Milwaukee, Wisconsin. The June 1991 PES estimate of Madison's undercount was 2.565%. Milwaukee's was 1.234%. Revised estimates published a year later reversed the two cities' undercounts, showing Madison with an estimated undercount of 1.156%, compared to 2.298% for Milwaukee. U.S. Department of Commerce, Bureau of the Census, *Report of the Committee on Adjustment of Postcensal Estimates: Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates* (Aug. 7, 1992) ("CAPE Report"), Attachment 11, page 3. Had the PES totals been used in state redistricting, Milwaukee residents would have been placed in too large districts, and Madison residents in too small.

districts, where, for more than two and a half years, adjusted block-level data have been available for drawing new districts (Pet. App. 94).[5]

II. THE SECRETARY'S DECISION WAS CONSTITUTIONAL.

1. Census procedures may be employed which generate alternative census totals, although in this case, two sets of census numbers would not have been produced, but for the district court's recognition of a judicially enforceable right to census innovations claimed necessary to achieving the most accurate census practicable (Pet. App. 67, 108-09, 123, 133-34). The availability of competing census totals opens the possibility that the

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[5]Wisconsin regards respondents' silence in the face of the statement in its opening brief that it is not aware of any of the respondent states' having used the adjusted population data to redraw their congressional or legislative districts, Wisc. Br. at 44 n.36, as a concession that they have not. If respondents' actions, rather than their words, are considered, Art. I, § 2 is interpreted as permitting states to retain districts drawn using the best census data available at the time of redistricting--in the case of 1991 and 1992 redistricting, the 1990 census--even though better data subsequently become available. This may, in fact, represent the correct interpretation of Art. I, § 2's requirements. *Cf. Karcher v. Daggett*, 462 U.S. at 738 ("because the census count represents 'the best population data available' . . . it is the only basis for good-faith attempts to achieve population equality"). But if this is the correct interpretation, the same rule, applied to the apportionment of Congress, would mean that the existing apportionment is constitutional, since the adjusted state population totals were also not available at the time of apportionment. While state congressional redistricting is governed by a standard of precise mathematical equality, *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *Karcher v. Daggett*, 462 U.S. at 734, this standard is illusory for the nation as a whole. *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 463 (1992). There is no logic in seeking to compel a reapportionment of Congress, six or more years into the decade, on the ground that new census numbers are claimed now to represent the "best population data available" for apportionment, if, under Art. I, § 2's much higher standard, states may constitutionally retain districts drawn before the new data were available.

selection of one set may be claimed inconsistent with the Constitution, not because the procedures producing the numbers violated any constitutional standard in and of themselves,[6] but because the alternative numbers are alleged to produce a better apportionment of Congress. This possibility was suggested in *Franklin v. Massachusetts*, where the Court referred to the appellees' failure to demonstrate that the exclusion of overseas personnel from the states' population totals would make representation in Congress more equal, citing the Art. I, § 2 redistricting standard that plaintiffs challenging a state redistricting plan bear the burden of proving avoidable population inequalities. 112 S. Ct. at 2778 (citing *Karcher v. Daggett*, 462 U.S. at 730-31).

The Second Circuit attempted to apply Art. I, § 2's standard requiring states to make a "'good-faith effort to draw districts of equal population'" (Pet. App. 37 (quoting *Karcher v. Daggett*, 462 U.S. at 730-31)), in assessing the constitutionality of the Secretary's decision. Much of respondents' brief is also devoted to demonstrating that the Secretary did not approach the adjustment decision in "good faith"--or what seems more strongly suggested by respondents' extensive discussion of facts not mentioned or relied on by either court below, to demonstrating that the

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[6]Respondents argue the Secretary's failure to give weight to the numeric accuracy of the adjusted counts as inconsistent with the constitutional constraint that no more than one Representative be apportioned every 30,000 people. Resp. Br. at 53 n.23. The point would be apposite if what was at issue were the results of the 1790, rather than 1990, census, or if the House of Representatives had on the order of 8,000 members. The argument represents an awkward attempt to buttress the Second Circuit's error in concluding that the Secretary's failure to "make the required effort to achieve numerical accuracy as nearly as practicable" compelled review under a heightened standard of scrutiny (Pet. App. 39).

Respondents choose not to address the conflicts between constitutional text and principles and specific aspects of the PES argued in Wisconsin's opening brief. *See* Wisc. Br. at 40-43.

case should be remanded for further proceedings to determine whether good faith was in fact exercised.[7]

Part of the answer to respondents' argument that an absence of good faith is demonstrated by the Secretary's purported usurpation of the Census Bureau's census authority is that constitutionally, the authority to decide how to conduct the census lies with Congress, which has in turn broadly delegated the authority over decisions regarding the form and content of the census to the Secretary of Commerce, subject to congressional oversight. 13 U.S.C. § 141(a), (f). Congress has also vested the President with the final authority to report the states' populations and the new apportionment of Congress, 2 U.S.C. § 2a, directing the Secretary to report the results of the apportionment census to the President by December 31 of the census year. 13 U.S.C. § 141(b). That a decision whether to go forward with the first-ever nationwide estimation of the apportionment census would not be left to a professional bureaucracy, where the results of the estimation process could not be completed until after Congress had been reapportioned, Certificates of Entitlement sent to the states, and state redistricting begun, seems hardly unusual, let alone, unconstitutional. Another answer to respondents' argument is that they stipulated to the Secretary's redeciding whether to adjust the census, just as they stipulated to the appointment and method of appointment of a Special Advisory Panel, and to the Secretary's deciding whether to adjust based on a set of future guidelines articulating the technical and policy grounds on which the decision would be reached

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[7]Towards the end of their brief, respondents explicitly ask for a remand different from that ordered by the court of appeals, suggesting that the court's remand "would be appropriate to permit the Secretary to redetermine the comparative accuracy of the two counts under a constitutionally permissible definition of distributive accuracy." Resp. Br. at 57. *Amici* supporting respondents are still more direct, arguing that on remand the district court should now determine whether the Commerce Secretary acted in good faith to ensure a census that was as accurate as practicable. Lawyers' Comm. Br. at 18-20.

(J.A. 61-67). As one of forty-three states not invited to nominate any members of the Special Advisory Panel, and as a state not asked to stipulate to a post-census survey that would estimate its population based on sample observations taken primarily in other states, *see* Wisc. Br. at 6, 41-42, Wisconsin finds little sympathy for respondents' sense of injury.

With respect to respondents' argument that the Secretary evaluated the distributive accuracy of the census under irrational criteria, the district court found the Secretary's evaluation of the errors introduced through estimation to have been reasonable (Pet. App. 71-84).[8] If the Secretary's analysis had been irrational, then the district court's findings under an arbitrary and capricious standard would have been wrong. Respondents did not challenge the district court's findings that the decision was not arbitrary or capricious on appeal, even if they appear to be doing so in this Court. In addition, the Secretary plainly considered factors affecting the accuracy of the adjusted numbers bearing on census uses.[9]

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[8]For arguing that the Secretary's refusal to follow the recommendations of the Director of the Census Bureau and Census Bureau staff evinced a lack of good faith, respondents fail to mention that the Bureau's Director also stated in her recommendation that adjustment was an issue as to which reasonable men and women and the best statisticians and demographers could disagree (J.A. 73). Respondents also do not mention that both the Under Secretary for Economic Affairs and Administration and the Administrator of the Economics and Statistics Administration recommended against adjustment (Pet. App. 59).

[9]As summarized in Wisconsin's opening brief, Wisc. Br. at 8-10, these included evidence casting significant doubt on the homogeneity assumption underlying the entire estimation procedure; the sensitivity of the estimates to variations in modeling assumptions, particularly as affecting the apportionment of Congress; bias introduced through procedures used to "smooth" the raw adjustment factors; the necessity of imputing a significant number of unresolved sample/census matches, and significant measured bias in the estimates. *See also* U.S. Br. at 13-19. The Secretary also expressed concern that the estimates had

2. The greater problem in respondents' argument is that it simply treats the concept of "good faith," engrafted onto census decisions by analogy to Art. I, § 2 redistricting, as an open-ended standard of subjective purpose.

As argued in Wisconsin's opening brief, and again unanswered by respondents, "good faith" in redistricting reflects the objective feasibility of achieving smaller population deviations in a state plan, rather than the state's purpose in adopting a plan. If a redistricting plaintiff is able to put forward a plan that achieves smaller population deviations than the state's plan, the state plan fails. If the redistricting plaintiff is unable to demonstrate the ability to draw districts with smaller population deviations, his claim fails. *Karcher v. Daggett*, 462 U.S. at 731 ("if [redistricting plaintiffs] fail to show that the differences could have been avoided the apportionment scheme must be upheld"). The claim does not become better because the state relied on a particular statistician, assisted by a single graduate student, *cf.* Resp. Br. at 37 n.17, to develop its plan, or because the state legislature adopted a plan after "undelegating" the authority of a non-partisan redistricting commission.

Applying these principles to the census, if one set of census totals produced an incorrect apportionment of Congress, and another set produced the correct, or at least a "better," apportionment, the deliberate choice of the totals resulting in the worse apportionment would be inconsistent with the goal of equal representation. The decision not to use available numbers resulting in a better apportionment would be analogous to a state's failure to create equal population congressional districts, where

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been generated under severe time constraints employing cutting edge statistical techniques, creating the risk that a decision to adjust might be based on research conclusions later reversed (Pet. App. 248). The subsequent discovery of two errors in the PES accounting for nearly a fourth of the original undercount estimate (Tr. 1786-87, 1790-91; DX 31) confirmed the validity of this concern and its bearing on census uses.

smaller population deviations could have been achieved by adopting a different redistricting plan. As in Art. I, § 2 redistricting, "good faith" in the selection of census results would reflect objective feasibility. If alternative census numbers could not be determined to improve the apportionment of Congress, the decision not to use them would be at least "consonant with, though not dictated by" the goal of equal representation. *Franklin v. Massachusetts*, 112 S. Ct. at 2778. And if "better" numbers were not available at the time of apportionment, the failure to use them would not be inconsistent with constitutional language or the goal of equal representation. *See* n.5, *supra*. Where the relief sought is of no less moment than a judicially mandated reapportionment of Congress, the threshold burden imposed on census litigants should be no lower than that imposed on redistricting plaintiffs.

3. Respondents failed to demonstrate the Secretary's ability to make representation in Congress more equal by substituting the PES estimates for the enumeration census. Had respondents been able to make this showing, we would expect a much earlier, more forceful and more direct statement in their brief, repeated with as much frequency as they invoke the differential undercount, that the apportionment of Congress under the enumeration census was wrong and that the apportionment under the PES was at least "better," if not correct. Instead, respondents describe adjustment as "promot[ing] the goal" of equal representation for equal numbers of people, Resp. Br. at 66, or as an elephant that is larger than a horse, but smaller than a whale. *Id.* at 62.

Roughly a third of the way through their brief, respondents announce for the first time that Congress was malapportioned under the enumeration census, writing:

> The PES results showed too that the uncorrected census counts led to a malapportionment of the House of Representatives, with two seats erroneously assigned to Wisconsin

> and Pennsylvania that should *in fact* have gone to California and Arizona, respectively.

Resp. Br. at 27 (emphasis added).

It is very hard to find in respondents' brief, where this "fact" is demonstrated.[10] Neither the district court nor the court of appeals found that the PES apportionment gave either the correct apportionment or one better than the enumeration apportionment. The district court expressly found that respondents had failed to illustrate affirmatively the superior accuracy of the estimates at "any level mentioned in Guideline One [national, state or local], or . . . for any reasonable definition of accuracy" (Pet. App. 78).[11] The court of appeals described the adjusted numbers as resulting in an apportionment which

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[10]No record cite is given. Immediately following this assertion, respondents discuss the impact of estimated census errors on equality of representation in intrastate redistricting. *See* Resp. Br. at 26-27. Seven pages later, respondents identify the "final loss function analysis" as also showing "that the unadjusted counts are expected, approximately, to malapportion two more seats in the House of Representatives than are the adjusted counts." *Id.* at 33. Yet the same loss function analysis is later cited as showing Wisconsin's loss of a House seat to California, *id.* at 62 n.26, not Pennsylvania's loss and Arizona's gain of yet another seat. Loss function analysis is discussed at n.13, *infra*.

[11]Respondents rewrite the district court's decision to make the word "any", used twice, read "every." Resp. Br. at 46 ("The court's point was that guideline one required an affirmative showing of superior accuracy of the adjusted counts at *every* level and for *every* reasonable definition of accuracy . . . ." (emphasis added)). Wisconsin interprets the district court's statement as meaning what it says. While the district court found itself to favor the adjusted numbers, it recognized that an affirmative demonstration of their superiority at the national, state and local level had not been made. While not citing the burdens of proof in Art. I, § 2 redistricting cases, the court's finding was consistent with the Art. I, § 2 threshold standard requiring a redistricting plaintiff to demonstrate affirmatively the ability to draw districts with smaller population deviations.

was "just as accurate" as the President's apportionment, not in a better apportionment (Pet. App. 38).[12]

Thirty-five pages after announcing that Wisconsin and Pennsylvania were apportioned House seats "in fact" belonging to California and Arizona, respondents argue that California was in fact entitled to a seat apportioned to Wisconsin. Resp. Br. at 62. Here, respondents are more explicit in identifying the evidence they believe supports the claim.[13] It is natural to wonder what happened to

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[12]The court of appeals' statement that the Secretary had declined to make the adjustment "if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (Pet. App. 38), becomes, in respondents' brief, a statement by the court that the Secretary had declined to adjust "if there were any distributive consequence with respect to which an adjusted census 'would be different from . . ., although just as accurate,' as the unadjusted." Resp. Br. at 68 (quoting Pet. App. 38). For respondents, the apportionment of Congress is treated as "any distributive consequence[ ]" of the adjustment decision.

[13]Respondents note Wisconsin's loss of a seat to California under Professor Wachter's recalculation of state population estimates using modified modeling assumptions. Resp. Br. at 62 (*see* A.R., App. 3, K. Wachter Report, Table 2.1.). Wachter's estimates, in addition to being point estimates, were based on the PES data. Wachter did not take a new sample. At the time of the adjustment decision, PES data were known to contain significant measured and unmeasured bias. Correction of two subsequently discovered errors reduced California's population estimate by nearly 275,000 (DX 31, Attachments 2, 4). That flawed estimates were "robust" with respect to two states' apportionments hardly demonstrates that this gave the correct apportionment. The more important result of Wachter's calculations is that even if problems of bias and sampling error were ignored, the ability of statistical estimation to improve the apportionment of Congress was shown to be constrained by its extreme sensitivity to modeling assumptions.

Respondents also identify the Census Bureau's loss function analysis as "show[ing] that the unadjusted counts malapportion two seats more in the House of Representatives than do the adjusted," which they then suggest represent the "same seat from Wisconsin to California." Resp. Br. at 62 n. 26. Loss function analysis attempted to

Arizona, particularly given its status as the only respondent state capable of claiming additional representation under the statistical estimates.[14]

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measure the relative accuracy of the PES and enumeration census by comparing their results to a hypothetical "true" population distribution, referred to as the "target population" (Pet. App. 187-89; PX 42). The essence of the apportionment loss function procedure was to treat the target populations as giving the correct apportionment and then to compare this to the census apportionment and to multiple apportionments given, not by the PES population estimates, but by 1,000 simulations of the states' populations based on the PES. As noted in the Secretary's decision, this had the effect of eliminating the inaccuracies derived from using one particular set of adjustments (Pet. App. 189-90), even though, had the Secretary decided to adjust, only one set of adjustments necessarily could have been adopted. The actual apportionments given by the simulations were not reported, so it is not possible to know which states would have gained or lost representation (*see* PX 42, Tables 1, 2). The main point to be made is that the hypothetical "true" populations were not, and were known not to be, the true "true" populations. The generation of the target population "parcelled out" measured bias in the PES using 13 very broad categories called evaluation strata (Pet. App. 187). Moreover, the target population could not have corrected for the two subsequently discovered errors, accounting for nearly a fourth of the undercount estimate, since these were not known at the time. The consequence of this last fact is evident in a comparison of the states' hypothetical target populations and their population estimates after correction for the two errors. California's target population shown in PX 43, Table 1, was more than 250,000 higher than its corrected estimate; Arizona's target population was nearly 50,000 higher than its corrected estimated total; Wisconsin's target population was 22,000 less than its revised estimate (DX 31, Attachment 2).

[14]Respondents argue that there is no significance in the fact that California elected to be bound by the district court's judgment, stating that it would be an "odd consequence" for state residents to be put in a worse position "if their State joined their suit than if the State never participated at all." Resp. Br. at 62 n.27. There is nothing odd about the fact that a judgment binds a state which decides to join, or in the case of California, to initiate (J.A. 40 ¶ 10) a lawsuit, even though the state would not be bound if it had never commenced the action. That the right of apportionment in Congress is fundamentally a state right follows from the language of Art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within

The June 1991 estimates that purportedly showed Arizona's and California's entitlement to additional representation in Congress were subsequently found to contain two errors, accounting for nearly one fourth of the original undercount estimate. *See* Resp. Br. at 35 n.14. The correction of these errors also changed the state population estimates. The revised estimated population totals for the four states whose apportionments are at issue were: California, 30,596,258; Pennsylvania, 11,916,496; Wisconsin, 4,921,509; Arizona, 3,745,518 (DX 31, Attachment 2).[15] Under the method of equal proportions, the four states' priority values to a fifty-third, twenty-first, ninth and seventh House seat, respectively, would have been: California, 582,812; Pennsylvania, 581,465; Wisconsin, 580,005; Arizona, 577,946.[16] What this reveals

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this Union . . . .") and Section 2 of the Fourteenth Amendment ("Representatives shall be apportioned among the several States according to their respective numbers . . . ."). It is also reflected in the apportionment statute, 2 U.S.C. § 2a(b) ("Each State shall be entitled . . . to the number of Representatives shown" in the Presidents' apportionment statement).

[15]To simplify the calculations, only the states' estimated resident populations are used. The calculation of the states' apportionment priorities would require including overseas personnel allocated to their apportionment counts. The 1990 overseas populations for the four states were: California, 79,229; Pennsylvania, 43,067; Wisconsin, 14,976; Arizona, 12,757. Source: *United States Department of Commerce News*, CB91-07 (Jan. 7, 1991), Table 5. Including overseas populations in the states' counts does not change the results shown in the text.

[16]The apportionment of Congress is given by the procedure known as the method of equal proportions. 2 U.S.C. § 2a(a). State priority values are calculated by dividing each state's population by the square root of the product of the number of the state's last House seat apportioned, times the number of the next seat sought. *See Montana*, 503 U.S. at 452 n.26. The divisor for determining California's priority to a fifty-third House seat is therefore the square root of the product of 52 and 53, or 52.497618; the divisor for Pennsylvania's claim to a twenty-first Representative is the square root of 20 times 21, or

is that the basis of Arizona's claim to a seventh House seat, originally resting on a single methodological decision regarding the treatment of sample variances during "smoothing" (Pet. App. 220), rests on the existence of two undiscovered PES errors. This does not represent "a substantive principle of commanding constitutional significance." *Montana*, 503 U.S. at 463.

It also reveals that if the corrected estimates represented the states' "true" populations, the Secretary could not have improved equality of representation in Congress by substituting the PES estimates available at the time of his decision for the enumeration census. California's purported malapportionment under the census would have been exactly offset by Pennsylvania's malapportionment under the PES.

The calculation also shows that if the corrected point estimates represented the states' "true" populations, California and Pennsylvania would have higher priority than Wisconsin to the two contested House seats. *See also* U.S. Br. at 18-19. But as respondents note, "[b]ecause it is based on a sample, the PES is inevitably affected by sampling error . . . . " Resp. Br. at 31. Within margins of error equal to plus or minus two times the states' reported standard errors (Tr. 2373-74), any of the three states could occupy the high, middle or low priority to the two contested seats.[17] Except by ignoring random sampling error,

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20.493901; the divisor for Wisconsin's claim to a ninth Representative is the square root of 8 times 9, or 8.4852813; the divisor for Arizona's priority to a seventh seat is the square root of 6 times 7, or 6.4807406.

[17]The revised standard error for California was reported to be 119,228; for Pennsylvania, 57,736; for Wisconsin 19,642 (DX 31, Attachment 2). Somewhat larger margins of error were reported with the June 1991 estimates (A.R. App. 10 (June 13, 1991, Release), Table 5 (state margins of error reported as percentages of estimated national population of 253,978,000: California, 0.1152% (292,583); Pennsylvania, 0.0484% (122,925); Wisconsin, 0.0161% (40,890)). Adding two times Wisconsin's revised standard error to its point estimate would make its population 4,960,793. Dividing this number by the square root of 72

California could not claim an additional seat in Congress, whether from Wisconsin or Pennsylvania.

There were, however, other serious sources of error in the estimates. Measured bias was found to account for one-third of the original undercount estimates (Pet. App. 180).[18] Other sources of non-sampling error, see n. 9, supra, warranted "escalating skepticism" (Pet. App. 78) of the PES results.

In sum, the PES did not endow the Secretary with the ability to improve the apportionment of Congress, but only to change it. The goal of equality of representation does not mandate that substantial evidence of sampling and non-sampling error be ignored or that a process as complex as the PES, executed under severe time constraints, be assumed not to hold errors not immediately apparent. To compel a change in the census five years after the apportionment of Congress can accomplish no more than an arbitrary reallocation of rights of political representation, at the cost of throwing state redistricting, and the ability of the states' citizens to elect representatives under established districts, into turmoil. Arizona's claim to additional representation in Congress is based on undiscovered errors in the PES. The claim of California, which elected not to appeal the district court's

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would give Wisconsin a priority value of 584,635 to a ninth House seat. This is higher than Pennsylvania's and California's priorities to a twenty-first and fifty-third seat, respectively, calculated using the states' point estimates. *See* pages 16-17 and n.16, *supra*. Subtracting two times California's standard error from its point estimate would make its population 30,357,802. Dividing this number by the state's equal proportions divisor for a fifty-third Representative would give a priority value of 578,270--below both Pennsylvania's and Wisconsin's point estimate priority values.

[18]Bias remained after the recalculation of the population totals following the correction of the two late-discovered errors. *See* CAPE Report at 15 (noting that between 22% and 45% of the revised undercount estimate of 1.58% actually reflected measured bias and not measured undercount); *see also* 58 Fed. Reg. 69, 75 (Jan. 4, 1993) (bias-corrected undercount estimated to lie between 0.9% and 1.2%).

judgment, would require sampling error to be ignored, as well as multiple sources of non-random error. The other respondent states are unable to claim additional congressional representation under the adjusted numbers. Respondents do not have an interest in compelling other states' redrawing their congressional and legislative districts. The respondent states' commitment to correcting the inequalities alleged to exist in their own districts is belied by their failure to draw new districts using the adjusted block-level data ordered released by the district court. This case does not involve protecting constitutional rights, but disregarding the express language of the Constitution, this Court's census and redistricting precedent and the statutes enacted by Congress directing the manner of taking the census.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

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